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IN THE

# Supreme Court of the United States

October Term, 1955

No. 863

SWORD LINE, INC.,

*Petitioner,*

AGAINST

UNITED STATES OF AMERICA.

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## INDEX


| | PAGE |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Principal Questions Presented | 2 |
| Statutes Involved | 3 |
| Statement of the Case | 5 |
| Reasons for Granting the Writ | 11 |
| Conclusion | 22 |
| Appendix A | 23 |
| Appendix B | 41 |


## CASES CITED


Archawski v. Hanioti, 223 Fed. 2d 406 ..... 12, 13, 14

Klebe v. United States, 263 U. S. 188, 191-192 ..... 16
Krauss Bros. Co. v. Dimon SS Corp., 290 U. S. 117 ..... 11, 13, 14, 15, 16, 17

Schneider v. Allis-Chambers, 196 Wis. 56, 62 ..... 16
Smith-Johnson Steamship Corp. v. United States, (not yet reported) ..... 11, 12, 41
Swift & Co. v. Compania Caribe, 339 U. S. 684, 690.. 19
Sword Line, Inc. v. U. S. A., 228 Fed. 2nd 344 .... 2, 12, 23
Sword Line, Inc. v. U. S. A., (not yet reported) .. 2, 12, 32
Sword Line, Inc. v. U. S. A., 134 Fed. Supp. 631 ... 2

PAGE

United States v. Atlantic Mut. Ins. Co., 298 U. S. 483 ..... 20, 21

Williams v. Goodyear Aircraft Corp., 84 Ohio App. 113-117 ..... 16

---

## STATUTES CITED

28 U. S. C. Sec. 1254 (1) ..... 2

28 U. S. C. Sec. 2101 (c) ..... 2

28 U. S. C. Sec. 2106 ..... 2

Merchant Marine Act of 1936 (49 Stat. at L. 1985).. 4

Merchant Ship Sales Act of 1946 (60 Stat. at L. 4).. 3, 6

The Suits in Admiralty Act of March 9, 1920, 41 Stat. 525, 46 U. S. C. 741 et seq. ..... 5

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## AUTHORITY CITED.

Professor Robinson, 10 Tulane Law Review, 359 ... 14

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SWORD LINE, INC.,

*Petitioner,*

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UNITED STATES OF AMERICA.

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

Sword Line, Inc., a Delaware corporation, with its principal office in New York City, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which became final on February 24, 1956.

The decision below is not in accord with prior adjudications of this Court, and it also appears to affect many pending litigations. It is contrary to the decision of the United States Court of Appeals for the Second Circuit in another recent case and it is also in direct conflict with a current decision of the United States Court of Claims involving virtually the same state of facts. The said decision of the Court of Appeals is highly prejudicial to the petitioner.

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## Opinions Below

The Court of Appeals for the Second Circuit rendered opinions on two occasions in this case. The first opinion was issued on December 14, 1955 (R. pp. 61a-69a) and is reported in 228 Fed. 2nd 344. (Also printed in full herein in Appendix A, pp. 23 to 31.)

The second opinion of the Court of Appeals for the Second Circuit was issued on February 24, 1956 (R. pp. 124a-132a) after the rehearing of the case. It has not yet been reported, but is printed in full herein in Appendix A, pages 32 to 39.

The opinion of the District Court for the Southern District of New York (R. pp. 35a-37a) is reported in 134 Fed. Supp. 631. The question of admiralty jurisdiction of this case was not raised in the District Court, but was brought up for the first time in the Court of Appeals.

## Jurisdiction

The Court of Appeals for the Second Circuit entered its decision on December 14, 1955 (R. p. 70a), and on December 28, 1955, the said Court entered its order extending the time to file a petition for rehearing to January 19, 1956 (R. p. 78a). The Court of Appeals' order reaffirming its decision entered December 14, 1955 was entered on February 24, 1956 (R. p. 133a). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1), 28 U. S. C. Sec. 2101 (c), and 28 U. S. C. Sec. 2106.

## Principal Questions Presented

1. Can a court of admiralty have jurisdiction over a claim for money unconscionably retained in violation of the provisions of an Act of Congress, although not in violation of a maritime contract.

2. Does admiralty have jurisdiction over a suit in quasi contract for money had and received when there is an express maritime contract, but no breach thereof.

3. Can a court of admiralty dismiss a libel for lack of jurisdiction of the district court and at the same time make an adjudication involving the merits of the libel and some of the issues in the case.

4. Irrespective of the question of jurisdiction, when there are issues of fact, can a court of admiralty dismiss a libel upon respondent's exceptive allegations, without a trial.

**Statutes Involved**

*Merchant Ship Sales Act of 1946* (60 Stat. at L. 41) of which Section 5 provided in part as follows:

> "Sec. 5. (a) Any citizen of the United States and, until July 4, 1946, any citizen of the Commonwealth of the Philippines, may make application to the Commission to charter a war-built dry-cargo vessel under the jurisdiction and control of the Commission, for bare-boat use. The Commission may, in its discretion, either reject or approve the application, but shall not so approve unless in its opinion the chartering of such vessel to the applicant would be consistent with the policies of this Act. No vessel shall be chartered under this section until sixty days after publication of the applicable prewar domestic cost in the Federal Register under subsection 3(c) of this Act.
>
> "(b) The charter hire for any vessel chartered under the provisions of this section shall be fixed by the Commission at such rate as the Commission de-

termines to be consistent with the policies of this Act, but, except upon the affirmative vote of not less than four members of the Commission, such rate shall not be less than 15 per centum per annum of the statutory sales price (computed as of the date of charter). Except in the case of vessels having passenger accommodations for not less than eighty passengers, rates of charter hire fixed by the Commission on any war-built vessel which differ from the rate specified in the subsection shall not be less than the prevailing world market charter rate for similar vessels for similar use as determined by the Commission.

"(c) The provisions of sections 708, 709, 710, 712, and 713, of the Merchant Marine Act, 1936, as amended, shall be applicable to charters made under this section."

*Merchant Marine Act of 1936* (49 Stat. at L. 1985) of which Section 709 provides as follows:

"Sec. 709. (a) Every charter made by the commission pursuant to the provisions of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Sommission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided*, That the cumulative net profit so accounted for shall

not be included in any calculation of cumulative net profit in subsequent years.

"(b) Every charter shall contain a definition of the terms 'net voyage profit' and 'fair and reasonable overhead expenses', and 'capital necessarily employed', as said terms are used in subsection (a) of this section, setting forth the formula for determining such profit and overhead expenses and capital necessarily employed, which definitions shall have been previously approved by the Commission and published in the advertisement for bids for such charter."

*The Suits in Admiralty Act of March 9, 1920, 41 Stat. 525, 46 U. S. C. 741 et seq., as amended December 13, 1950,* provides in pertinent part as follows:

"Section 745. Suits as authorized by this chapter may be brought only within two years after the cause of action arises: * * * "

## Statement of the Case

The libelant instituted this libel proceeding on July 28, 1954 (Docket Entries, R. p. 1a), to recover from the United States of America a refund of excess additional charter hire in the total amount of approximately $1,800,000 (Libel allegation Tenth, R. p. 8a), which was, in violation of an Act of Congress, illegally charged against and collected from libelant under a bareboat charter agreement between libelant and United States Maritime Commission dated September 7, 1946, known as Contract MCc-41870 (R. pp. 6a, 39a), which superseded an earlier contract dated June 17, 1946, known as Contract WSA-13088 (R. p. 39a).

In the period of time between June 17, 1946 and July 30, 1948, libelant was, from time to time, the bareboat

charterer and operator under said bareboat charter contract of 44 different Government vessels of the Liberty Ship and Victory Ship types (R. p. 18a). The law (Section 5 of the Merchant Ship Sales Act of 1946, 60 Stat. 41) (R. p. 4a) prescribed a fixed basic rate of charter hire and Section 709 of the Merchant Marine Act of 1936 (49 Stat. 1985) (R. p. 5a) provided that after the payment of said basic charter hire together with a reasonable allowance for the charterer's overhead expenses, the charterer was entitled to a profit equal to 10 per centum per annum of its capital employed in the operation, and if the profit should exceed such 10 per centum, that in such event the charterer shall pay to the United States Maritime Commission, as additional charter hire, one-half of such excess (R. p. 5a). There is no other provision of law authorizing the Maritime Commission to charge or collect further additional charter hire. The statute limits the Commission's participation to 50% of the excess above 10%.

Nevertheless, the United States Maritime Commission inserted a clause in its standard forms of charter known as WARSHIPDEMISEOUT #203 and SHIPSALES-DEMISE #303, being Clause 13 of such charters, the phraseology of which is set forth in Article Sixth of the libel (R. p. 6a). By such clause the respondent exacted from libelant, entirely contrary to law, excess charter hire computed on a graduated scale running up to 90 per centum of the excess over 10 per centum per annum on the capital necessarily employed (Allegation Tenth, R. p. 8a; Affidavit, R. p. 40a).

Furthermore, said Clause 13 of the charter also provided that the additional charter hire so exacted shall be deemed to be preliminary and subject to adjustment upon the completion of a final audit, "at which time" "overpayments" will be "refunded to the charterer as may be

required" (R. p. 7a). Clause 13 of the charter thus fixed the time prior to which no suit to recover overpayments could be brought. The libel proceeding in the case at bar was instituted for the express purpose of recovering the said refunds of the overpayments of additional charter hire, recently found to be illegal (R. p. 42a).

In the course of its operations of the chartered vessels from June 17, 1946 until July 30, 1948 (R. pp. 38a, 40a), the libelant paid to the respondent, by eleven different checks, a total sum of $1,067,075.34 as additional charter hire (R. p. 40a). Photostat copies of such checks are annexed to the affidavit of M. J. Frechie submitted in opposition to respondent's motion (R. pp. 43a to 53a incl.). After July 30, 1948, the Government made demand for a further sum of $660,177.94 for additional charter hire which it claimed was also due from libelant (R. p. 40a), and it was paid on August 20, 1952 when a comprehensive payment of $1,100,000 was made (R. pp. 15a, 41a).

On July 30, 1948, because of precipitate action on the part of the Maritime Commission in abruptly cancelling the charters of 32 vessels then in operation, the libelant was compelled to file a Petition for an Arrangement in the Bankruptcy Court pursuant to Chapter XI of the Bankruptcy Act (R. pp. 16a to 20a incl.). In said petition the libelant showed that it was not insolvent (R. p. 20a, paragraph 14), but was at the time unable to pay its 1500 unsecured creditors as its debts to them matured, because of the sudden drastic action by the Maritime Commission (R. p. 18a, paragraph 9). As is customary in such cases the Bankruptcy Court forthwith issued a restraining order enjoining the institution of all suits.

It took four years, July 30, 1948 to July 31, 1952, to bring the proceedings in the Bankruptcy Court to a conclusion, only because the large demands of the respondent as a priority creditor seemingly nullified the possibility

of paying the claims of the unsecured creditors. On January 11, 1950, a year and one-half after the proceeding in the Bankruptcy Court was started, the respondent filed a proof of claim, as a priority claim for $3,992,038.32 (R. pp. 21a, 22a), which included monies arising from the charters of a number of ships and it necessarily included the sum of $660,177.94 mentioned above as further demanded by the Maritime Commission for additional excess charter hire. In this proof of claim the respondent admitted that the libelant was the holder of judgments against the United States for the better part of $1,000,000 (R. p. 22a) which had been obtained by the libelant in the District Court, Southern District in 1947, but which the United States Maritime Commission, prior to its cancellation of the charters, had steadfastly refused to recognize or honor (R. p. 19a).

After the filing of said proof of claim the matter of auditing the accounts between the libelant and respondent and determining the claims known to exist between them, necessitated the appointment by the Court of a disinterested advisory arbiter, one John J. Burns, to arrive at a finding which might become binding if it resulted in the confirmation of a plan of arrangement (R. p. 33a). The 1500 unsecured creditors were compelled to stand by for an additional two years to await the outcome of the deliberations over the respondent's claims. During said proceedings in the Bankruptcy Court any claim based upon the illegality of the exaction by the Maritime Commission of excess additional charter hire was unknown (R. p. 42a).

The proceeding for an arrangement was finally brought to a conclusion on July 31, 1952, when the respondent accepted the libelant's Amended Plan of Arrangement (Exceptive Allegations 8, R. p. 15a) whereby the libelant paid to the respondent $1,100,000 in cash on August 20, 1952, and libelant has been continuing to pay $150,000 more, in instalments of $30,000 per annum. Inasmuch as

the said Amended Plan of Arrangement contained a paragraph 4 entitled "Settlement with the United States of America" (R. p. 24a) the respondent contended that the claim now urged by libelant in its libel had been disposed of by such settlement, and accordingly respondent interposed exceptive allegations praying for a summary dismissal of the libel. The motion on the exceptive allegations was argued before Hon. Judge Thomas F. Murphy, and although there were issues of fact Judge Murphy sustained the exceptive allegations and entered the decree of dismissal of the libel, without granting a trial (R. p. 54a). The ground of dismissal was that the plan of arrangement barred the libel.

It was only after July 31, 1952, at which time, the Amended Plan of Arrangement was accepted and the order of confirmation was entered in the Bankruptcy Court, that the libelant could resume the status of a going concern with authority to reorganize its business.

The "final audit" alluded to in Clause 13, which clause contained the stipulation between the parties to the contract as to the time when refunds would become due, was really completed by libelant when it made its own cumulative profit and loss audit in 1953 and ascertained that the operation of the 44 vessels under the contract with the Government resulted in a cumulative loss (R. p. 41a). As there was no cumulative net voyage profit, the entire amount of $1,067,075.34 paid through the said eleven checks, and the additional sum of $660,177.94 being included in the payment of $1,100,000 paid on August 20, 1952, all of which as stipulated by Clause 13 to be "deemed to be preliminary and subject to adjustment", constituted an illegal overpayment which should be refunded to the charterer.

Accordingly the libel for the recovery and refund of the additional charter hire totaling $1,800,000 wrongfully exacted from libelant, was filed on July 28, 1954 (Docket

Entries, R. p. 1a), less than two years after the confirmation of the plan of arrangement on July 31, 1952 (R. p. 15a) which fixed the ultimate figures, and also fixed the time when suit could be brought, and less than two years after the last remittance was made of $660,177.94 on account of excess additional charter hire on August 20, 1952 (R. pp. 15a, 40a).

Libelant instituted this proceeding on the admiralty side of the District Court under the impression that admiralty had jurisdiction. Hon. Judge Murphy did not look into the question of jurisdiction, and the respondent did not raise that question. It was not until after libelant took an appeal to the United States Court of Appeals for the Second Circuit, and after the case reached that Court, that respondent for the first time raised the question of jurisdiction, and then only on the theory that libelant's claim was time-barred under the Suits in Admiralty Act. It was not until the case actually came before the Court of Appeals, that Hon. Judge Hand, from the bench, injected the question of whether admiralty, in the first instance, had any jurisdiction.

After the case was heard and considered by the Court of Appeals Hon. Judge Hand wrote the opinion in which he set forth his dissenting views and reluctantly concurred with his brothers in affirming the decision of the District Court, as well as dismissing the libel for lack of jurisdiction of the District Court (Appendix A herein, p. 31).

Thereafter libelant applied for a rehearing which was granted, and after due deliberation the Court of Appeals rendered its decision on rehearing, the majority opinion being written by Hon. Chief Judge Clark (Appendix A, p. 38), who ruled that the libel is in quasi contract, that admiralty has jurisdiction, that the action must fail because of the running of the two-year statute, and also that the claim of libelant is barred by the release in the executed

Plan of Arrangement. A separate dissenting opinion was written by Hon. Judge Hand in which he reiterated his reluctance to deviate from the long established precedents which hold that admiralty has no jurisdiction of cases in quasi contract, but he bowed to the doubtful interpretation by his brothers of the United States Supreme Court decision in the case of *Krauss Bros. Co.* v. *Dimon SS Corp.*, 290 U. S. 117; he also voiced his emphatic disagreement with his brothers on the bench when they dismissed the libel for lack of jurisdiction and simultaneously made a determination as to the effect of the release in the plan of arrangement over which they lacked jurisdiction (Appendix A herein, p. 39).

Moreover, where there were issues in the case, final judgment dismissing the libel as barred by the Plan of Arrangement should never have been rendered on exceptive allegations, thus depriving the libelant of proving by the record, among other facts, that the taxes at stake were more than "only a trifling part of the mutual claims" as the Court of Appeals assumed (R. p. 69a) (also Appendix A herein, p. 31), but that said taxes in fact exceeded $625,000 (R. p. 95a).

## Reasons for Granting the Writ

1. *The decision below is in conflict with the recent decision of the United States Court of Claims in the case of Smith-Johnson Steamship Corp.* v. *United States, decided March 6, 1956.*

The decision in that case in the Court of Claims has not yet been reported, but a copy of it is submitted herewith and printed in full (Appendix B, pp. 41 to 47). The complaint in that case is in all practical respects a counterpart of the libel in the case at bar, and the cause of action is identical, namely that the Maritime Commission exacted excess charter hire in violation of the Merchant Marine Act of 1936.

In the unanimous opinion rendered in this *Smith-Johnson* case the Court of Claims cites and discusses the case at bar as reported in 228 Fed. 2nd 344, and refuses to consider the ruling to be sound. The facts in this *Smith-Johnson* case are exactly the same as in the *Sword Line* case now before us, and in each case the facts will not support any presumption that the parties agreed to a hire no greater than the statute permitted; in truth and in fact the parties did agree to a hire far in excess of that provided in the statute—and the Maritime Commission collected it. In both cases the cause is for the violation of an Act of Congress, not for a breach of contract. There was no breach of contract in either case and none can be spelled out.

Because the rulings of the Court of Claims are in conflict with the rulings of the Second Circuit Court of Appeals in this present *Sword Line* case, it is urged that the writ of review herein applied for be granted, and that the case be reviewed, so that the scope of admiralty jurisdiction may be clearly established.

2. *The decision below clashes with the decision of the Second Circuit in the case of Archawski* v. *Hanioti*, 223 Fed. 2nd 406.

In the *Archawski* case, decided June 3, 1955, the Second Circuit Court of Appeals (by Judges Frank, Medina and Hincks) made the distinct ruling that the admiralty courts have no jurisdiction over an action in quasi contract for money had and received. On December 14, 1955, the same Second Circuit Court of Appeals (by Judges Clark, Waterman and L. Hand) in the *Sword Line* case at bar, reported in 228 Fed. 2nd 344, made precisely the contrary ruling (Judge Hand dissenting) that an action in quasi contract for money had and received is within the jurisdiction of admiralty.

There is a distinction between the two cases; the cause is not the same in each case. In the *Archawski* case the cause

is a breach of contract of a maritime nature, and under such circumstances "admiralty is not concerned with the form of the action, but with its substance". When the cause is the breach of a maritime contract it does not matter if the action is in the form of a common law action of *indebitatus assumpsit;* admiralty will have jurisdiction.

In the *Sword Line* case, however, the cause is the violation of an Act of Congress; there is no breach of contract of any kind; the substance for maritime jurisdiction is lacking.

Both of these decisions, in the same circuit, state completely contrary views on the law of admiralty jurisdiction, and neither one of the decisions is correct. If the rulings were inverted both decisions would be correct. The writ of certiorari herein applied for should be granted to establish the correct rulings and terminate the confusion.

On April 9, 1956, just as this petition went to press, the United States Supreme Court rendered its decision reversing the *Archawski* case, but even such decision will not solve the problem at present confronting the litigants in the scores of cases pending in the courts—as was pointed out by the unanimous opinion of the Court of Claims (see Appendix B, *infra*, p. 46).

3. *The writ applied for should be granted because the question is important and there is considerable misunderstanding among judges and jurists as to the significance of this Court's decision in the case of Krauss Bros. Co.* v. *Dimon S.S. Corp.*, 290 U. S. 117.

An incorrect impression has become prevalent that this Court in its decision in the *Krauss* case, ruled that admiralty has jurisdiction over suits in quasi contract for money had and received. A careful reading of that case shows clearly that this Court made no such ruling; nevertheless the false impression has gained momentum and doubtless it will continue to grow unless this Court will set the matter at rest.

The writ should be granted because the question is of vast importance. Following June 3, 1955, when the case of *Archawski* v. *Hanioti* was decided by the Court of Appeals for the Second Circuit more than forty-five suits have been filed in the United States Court of Claims by different steamship companies to recover excess charter hire exacted by the Maritime Commission in violation of the statute. It is the contention of the government that on the authority of the *Sword Line* case and the *Krauss* case that admiralty has exclusive jurisdiction.

Contemporaneously there are a large number of suits pending in the United States District Court, Southern District of New York, in admiralty, seeking the recovery of illegal charter hire exacted by the Maritime Commission, and the government is moving in each such case to have the libels dismissed on the ground that they are time-barred by the two-year statute of limitations on the authority of the decision of the Court of Appeals, Second Circuit, of the *Sword Line* case, now before this Court.

Litigants are in a quandary to know where to bring their suits. Has the Court of Claims the jurisdiction to determine the cases? Or must the suit be brought under the exclusive jurisdiction of Admiralty? If the latter, does the statute of limitations run from the date of redelivery of the last vessel or from the date of the final audit of the accountings.

In this *Sword Line* case the opinion of Hon. Chief Judge Clark (Appendix A, p. 36) discusses the *Krauss* case and cites Professor Robinson's article in 10 Tulane Law Review 359, which at page 396 reads:

> The decision by Mr. Justice Stone (in the *Krauss* case) "seems to give adequate ground for the assumption that if the question of quasi contract jurisdiction in admiralty is precisely argued in the Supreme Court that tribunal is in a position to say that it had already decided the point affirmatively, if incidentally, in the Krauss case."

With all due respect to Professor Robinson a careful reading of Mr. Justice Stone's opinion shows clearly that the Supreme Court made no such decision, not even incidentally. In the *Krauss* case the contract between the parties was to transport a quantity of lumber from the west coast to the east coast at the rate of $10.00 per thousand feet, with a very explicit written proviso in the contract that in the event "a regular intercoastal carrier moves similar cargo at a lower rate" such lower rate should be applied. The lumber was transported and delivered in accordance with the contract and the rate of $10.00 per thousand feet was paid in full, and seemingly the contract was fully performed. Subsequently, however, it was discovered that another regular intercoastal carrier had been moving similar cargo at the same time at the rate of $8.50 per thousand feet. Krauss Bros. asserted a lien on respondent's vessel for the difference.

The Supreme Court decided that the contract was of a maritime nature and that the collection of more than $8.50 per thousand feet was a violation of the express provision contained in said contract, and it constituted a breach of a maritime contract which gave admiralty exclusive jurisdiction. Ordinarily an action for money collected and received is, in form, a common law action; but if the collection of that money constitutes a breach of a maritime contract then the substance of the cause is the breach of a maritime contract in which case admiralty has exclusive jurisdiction. Mr. Justice Stone points out very clearly that the basis of recovery in admiralty is the violation of some term of the maritime contract. That is a far cry from saying that admiralty has jurisdiction of a cause in quasi contract for money had and received, as such.

The very significance of the term "quasi contract" is that there is no contract at all, because the elements of agreement and consent are utterly lacking. The fiction is

that there is an implied contract. In the *Krauss* case there is an express contract in existence which speaks for itself and it excludes any implied contract; under those circumstances it was utterly impossible for the Supreme Court to render any decision on the basis of quasi contract. The law does not recognize the coexistence of a quasi contract and an express contract covering the same subject, and where there is an express contract the law will not step in to determine the rights of the parties under rules governing quasi contract. See *Williams* v. *Goodyear Aircraft Corp.*, 84 Ohio App. 113, 117; *Schneider* v. *Allis-Chambers*, 196 Wis. 56, 62; *Klebe* v. *United States*, 263 U. S. 188, 191-192.

Similarly, Hon. Chief Judge Clark is in error when he suggests that the *Krauss* case is taken quite generally "as overruling the earlier line of cases barring quasi contractual claims in admiralty" (Appendix A, p. 35). The Supreme Court committed no such error when it decided the *Krauss* case.

In the case at bar there was an express contract between Sword Line, Inc. and the United States, but there was no breach of that contract. Moreover there was no proviso in the contract to the effect that if the charges of 75% and 90% for the charter hire exceeded the maximum hire permitted by law the United States would not exact such excess charges. As the express contract contained no such proviso, none could be implied. The existence of an express contract excludes all implications (*Klebe* v. *United States*, 263 U. S. 188). The charter in the case at bar contained no such proviso as was contained in the charter in the *Krauss* case. The exaction of the illegal charges in the case at bar constituted no breach of the maritime contract, and there was no substance with which admiralty could concern itself. The excess charges are a violation of a statute; their exaction constituted a breach of the

statute—not a breach of a maritime contract. Admiralty has no jurisdiction in the case at bar, because the cause is not maritime, notwithstanding that somewhere in the offing there is a maritime contract between the parties. The existence of a maritime contract between the parties does not make the cause maritime. It is the breach of a maritime contract which makes the cause maritime, and it alone gives admiralty jurisdiction.

The majority opinion written by Hon. Chief Judge Clark, in the case at bar aims to give admiralty jurisdiction of every cause, regardless of its nature, if somewhere there can be found an "underlying maritime contract", no matter whether that contract be once, twice or thrice removed from the cause, and regardless of whether there has been a breach of such contract (Appendix A, p. 37).

In the original opinion in this case Hon. Judge L. Hand finds that the suit is in quasi contract for money had and received (Appendix A, p. 26), and in an attempt to agree with his brothers to give admiralty the jurisdiction he resorts, with obvious reluctance, to the device of presuming that the parties agreed to a contract which they did not make, namely, that they agreed to a hire for the vessels not in excess of the amount of hire which the law allowed; and on that implied basis, wholly at variance with the express contract, Hon. Judge Hand feels that the suit could be regarded as one for breach of a maritime contract, of which suit the admiralty could take jurisdiction—it might be more accurate to say, usurp jurisdiction.

The majority, however, are not in accord with such strained construction of the contract, and they would rather resort to a strained construction of the opinion of the Supreme Court in the *Krauss* case, and read it so as to give admiralty jurisdiction of all cases in quasi contract —which admiralty never had and which the Supreme Court did not say admiralty has, not even incidentally. The ma-

jority finally prefer to look for "an underlying maritime contract", and no matter how remotely the cause may be removed from such contract, and no matter whether the cause itself possesses any maritime nature, they seek to give admiralty the jurisdiction. They epitomize their ruling in these words:

> "We think it sounder, and more in accordance with the nature of admiralty, to rest upon the inherent maritime character of the underlying transaction, rather than upon an attempt to force this claim into the mold of a breach of contract" (Appendix A, p. 37).

The majority speak of this as being a broad approach, in keeping with the real spirit of admiralty, and as supporting admiralty jurisdiction over all claims which are basically and intimately intertwined with our vast shipping and maritime interests. Thereby they would bestow upon admiralty a far reaching and all-embracing jurisdiction, to the exclusion of other systems of jurisprudence.

The majority decision in the case at bar is completely at odds with the 9th section of judiciary act of 1789 (1 Stat. at L. 77) which provides that the district courts of the United States "shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction • • • saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." That the words "all civil causes of admiralty and maritime jurisdiction" relate to the nature of such "causes" is made manifest by the saving clause in the act. The only circumstance under which admiralty can have jurisdiction is when the cause is maritime—not merely when there is an "underlying maritime contract." Admiralty jurisdiction is not open to so broad an approach. Neither are we concerned with the "real spirit of admiralty" nor is admiralty jurisdiction based upon gener-

alizations such as claims being "intimately intertwined with our vast shipping and maritime interests." The cause in the first instance must be maritime before admiralty can assume jurisdiction. After the jurisdiction is found, admiralty can adapt its jurisdiction to all subsidiary and derivative issues which may arise in the litigation, whether they embrace equitable principles or take the form of common law actions. As was said by Mr. Justice Frankfurter in writing the unanimous opinion in the case of *Swift & Co.* v. *Compania Caribe*, 339 U. S. 684, 690; "as to admiralty jurisdiction we must be wary of verbal generalizations unrelated to their applications." We must first find a maritime cause before admiralty can assume jurisdiction; thereafter the powers of admiralty are broad enough to cope with all phases of the litigation and it will hardly be necessary to send a litigant elsewhere for part of his claim.

In another part of the majority opinion on rehearing (Appendix A, p. 35) Hon. Chief Judge Clark states:

> "In truth this is a refund of maritime payments originally enforceable in admiralty; there is no good reason for holding that the court which would decree the payment in the first instance should not decree the repayment which the admiralty law now requires."

The fallacy of such reasoning lies in the fact that the maritime payments called for in the maritime contract are originally enforceable in admiralty only if there is a breach of the maritime contract. If, as here, the payments are all made in full accordance with the maritime contract and with no violation of any of its provisions, admiralty has no jurisdiction to enforce anything—in the first instance. Likewise, in the second instance, admiralty has no jurisdiction to decree any repayment unless there is a breach of the maritime contract. The substance of admiralty

jurisdiction does not lie in the fact that somewhere in the near or remote offing there is an underlying maritime contract; the substance of admiralty jurisdiction lies in the breach of a maritime contract. In the present case there was no breach of the maritime contract. There was a violation of an act of Congress, a matter over which admiralty has no jurisdiction.

4. *The Court below is divided on the question of when the two-year statute of limitations under the Suits in Admiralty Act begins to run.*

After the Court below decided that jurisdiction of the case lies in admiralty the Judges could not agree on when the two-year period begins to run. If admiralty has the jurisdiction, the contract must be consulted to find out if there is a stipulation contained therein which fixes the time when a suit may be instituted. Clause 13 of the charter (R. p. 7a), in the last ten lines thereof, contains a very clear statement that upon completion of the final audit overpayments will be refunded. The phraseology contains the words "at which times", and it is those quoted words which fix the time for the refund of overpayments. Prior to that fixed time no suit for refunds could be instituted for the reason that such suits would be premature.

The majority opinion (Appendix A, p. 34) on rehearing says:

> "While Judge Hand felt that under the circumstances the audit was necessary to start the time running, we thought the authorities required the contrary view. See e.g. *United States* v. *Atlantic Mut. Ins. Co.*, 298 U. S. 483."

Ordinarily, the first day on which the obligee can bring suit marks the time when the statute begins to run, and

that day is customarily the day when all the facts are in existence on which the computation of the claim or profits depended. *United States* v. *Atlantic Mut. Ins. Co.* (*supra*), is authority for that proposition, provided there is no stipulation in the contract which fixes a different date. The said *Atlantic Mut. Ins. Co.* case, cited in the majority opinion, contains the explicit sentence on page 491 which says "in the absence of some stipulation on the subject, and there was none." In the case at bar there is a very distinct stipulation in the contract. Hon. Judge Hand found the stipulation but his brothers shut their eyes to it.

5. *The decision below dismissed the libel for lack of jurisdiction, and in complete obliviousness of such lack of jurisdiction, the majority erroneously made a determination of an issue in the case.*

The dissenting opinion of Hon. Judge Hand (R. pp. 131a, 132a) states:

> "Now that we have decided that the libel was filed too late, Judge Murphy never got jurisdiction over the claim at all; and our decision as to the effect of the arrangement is as little within our own jurisdiction as it was within his" (Appendix A, p. 39).

Such an inconsistent determination made by the Court below is highly prejudicial to the libelant because it is an adjudication against the libelant made by a court which had no right to make it. The Court below found "the very obvious intent of the parties" to be contrary to the very obvious meaning of the language of their agreement. Unless the adjudication is set aside by this Court it will stand as a final adjudication against the libelant without the libelant ever having had its day in court. Moreover, the entire matter came before the court on respondent's exceptive allegations, and despite the fact that the record shows

that there were issues in the case which could not be resolved without a trial, the Court below nevertheless rendered final judgment against the libelant without granting libelant a trial.

## CONCLUSION

The serious conflict in the decisions and the vast diversity of opinion which exists with respect to admiralty jurisdiction over suits in quasi contract is important, and of wide-spread interest throughout the American shipping world. Certiorari should be granted, and if granted, it is respectfully suggested that the case be set for hearing during the present term.

Respectfully submitted,

THEODORE J. BREITWIESER,
*Counsel for Petitioner.*

Dated: New York, N. Y., April, 1956.

# Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 160—October Term, 1955.

(Argued November 7, 1955 Decided December 14, 1955.)

Docket No. 23723

SWORD LINE, INC.,

*Appellant,*

—v.—

UNITED STATES,

*Appellee.*

Before:

CLARK, *Chief Judge,*
HAND and WATERMAN, *Circuit Judges.*

On appeal from a decree in the admiralty of the District Court of New York—Murphy, *J.*, presiding—in a suit to recover hire, alleged to have been unlawfully collected from the libellant, as charterer of vessels owned by the United States.

THEODORE J. BREITWIESER, *for the appellant.*

BENJAMIN H. BERMAN, *for the appellee.*

HAND, *Circuit Judge*:

The libellant appeals from a decree in the admiralty, dismissing its libel upon "exceptive allegations," filed by the

respondent. The claim, as alleged in the libel, was as follows. The Maritime Commission had chartered to the libellant forty-four vessels upon a "bare-boat charter," by virtue of authority granted by §5 of the Merchant Ships Act of 1946.* Subdivision (c) of this section incorporates §709 of the Merchant Marine Act of 1936,** which provides that, if at the end of any calendar year after such a charter is executed, the "cumulative net voyage profits" shall be greater than ten per cent of "the charter's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire one-half of such cumulative net voyage profit in excess of 10 per centum per annum." This language the Commission has construed to allow it to reserve as part of the hire more than one-half the surplus of the charterer's profit above ten per cent; and for this reason the charter in suit contained a sliding scale for the division of profits. The Commission's share was one-half the excess of profits over 10%, when the excess was not more than $100 a day; three quarters, when it was between $100 and $300; and nine-tenths, when it was over $300. The libellant accepted these terms; filed accounts with the respondent, "based upon the accountings prepared by respondent"; and paid the resulting sums as part of the hire. The suit is based upon the proposition that §709 fixed the division of profits at fifty per cent of the excess profits regardless of its amount, and that the Commission unlawfully forced the libellant to pay $1,800,000 above what was due.

The "exceptive allegations" alleged that the Commission put an end to the charter on July 27, 1948, by virtue of a reserved power; and that on July 30, 1948, the libellant filed a petition for an "arrangement" under Chapter XI

*60 Stat. at L. 41.
**49 Stat. at L. 1985.

of the Bankruptcy Act. On January 11, 1950, the Commission filed a claim in this proceeding for about $4,000,000, and on February 23, 1952, the libellant filed an "amended plan of arrangement," in the fourth paragraph of which it agreed that the respondent should "be paid the sum of $1,250,000 in full and complete compromise and settlement of all indebtedness of the Debtor to the United States of America and of all claims existing on July 30, 1948 between the United States of America and the Debtor." The respondent accepted the plan as so amended, and the referee in bankruptcy confirmed it on July 31, 1952. The libel was filed on July 28, 1954. The respondent raises two points in answer to the claim. First, it says that the claim arose on October 26, 1948, the day when the libellant surrendered the ships in accordance with the charter; and that, as that was more than two years before the libel was filed, the district court had no jurisdiction over the suit.* Second, it says that in any event the confirmation of the "arrangement" was a bar to the claim upon the merits. Judge Murphy did not pass upon the first point, because the respondent did not urge it; but he supported the respondent on the second and dismissed the libel by a decree which must have meant a dismissal upon the merits, though it did not so declare.

Before considering these two issues, we must decide whether the district court had any jurisdiction in admiralty over the controversy; for, although neither side has raised this objection, it is a question that under familiar law we must answer. The claim has for its premise that §709 of the Merchant Marine Act of 1936 made illegal that portion of "clause 13" of the charter that stipulated for the graduated scale of profit-sharing instead of for a division half and half, regardless of amount. It might be argued, if the libellant is right about §709, that no contract was ever

*Sgambati v. *United States*, 172 Fed. (2) 297 (C. A. 2).

made, because the section made the libellant's promise unenforceable and there were therefore no mutual promises. On the other hand, if the statute did indeed limit the Commission to an even division of profits, it was the Commission's duty so to limit the libellant's promise; and we should not assume that the Commission would not have chartered the ships, unless it was to receive the unlawful hire. Obviously, we may impute to the libellant willingness to pay the lesser hire; so that it is proper to proceed as though there had been a contract for an even division, and nevertheless the Commission had compelled the libellant to pay more than the disputed hire.* The suit is therefore in quasi contract for money had and received. In *United Transportation & Lighterage Co.* v. *New York & Baltimore Transportation Line*, 185 Fed. Rep. 386, this court in 1911 after a full examination held that such claims were not so far maritime as to be justiciable in the admiralty; the Ninth Circuit held the same thing in 1926**; and in a dictum we repeated the doctrine in 1947.† Even though I were better convinced than I am that our original decision was wrong, I should feel it my duty to follow it and to leave the question to the Supreme Court, were it not for *Krauss Bros. Lumber Co.* v. *Dimon S.S. Co.*, 290 U. S. 117 (1933), of which we were apparently not aware when we decided *Silva* v. *Bankers Commercial Corporation, supra* (163 Fed. (2) 603.) The Supreme Court held that, when a carrier had exacted more than the stipulated freight, the shipper might recover the excess by a suit in the admiralty to enforce a maritime lien. There could of

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*A. H. Bull Steamship Co. v. *United States*, 108 Fed. Supp. 95, 99 (Ct. Cl.); *Southeastern Oil Florida Inc.* v. *United States*, 119 Fed. Supp. 731, 734 (Ct. Cl.).

**Home Insurance Co.* v. *Merchants Transportation Co.*, 16 Fed. (2) 372.

†*Silva* v. *Bankers Commercial Corporation*, 163 Fed. (2) 603.

course be no doubt that, if the owner had refused to deliver the goods until the excess was paid, he would have broken his promise to deliver and the suit would be cognizable in the admiralty, although the damages might not be measured by the unlawful excess. That was not—at least as I read the opinion—the Court's reasoning; it assumed that the goods had been delivered, and put its decision upon the premise that the carrier had promised, not only to deliver the goods for the agreed hire, but thereafter not to demand anything further; and such a demand, if it was indeed a breach of the maritime contract, was of course cognizable in the admiralty. Having so interpreted the contract, the Court did not find it necessary to decide whether a claim in quasi-contract, based upon an unjust exaction after the contract had been completely performed, was also cognizable in the admiralty. For my own interpretation of the decision I rely upon what Stone, *J.*, said on page 124 which is all there is on the point: "Even under the common law form of action for money had and received there could be no recovery without breach of the contract involved in demanding the payment, and the basis of recovery there, as in admiralty, is the violation of some term in the contract of affreightment, whether by failure to carry or by exaction of freight which the contract did not authorize." My brothers do not agree with such a limited understanding of the decision; they think that it should be read so as to cover claims in quasi-contract; but under either understanding it is clear that the district court had jurisdiction over the suit at bar.

That does not, however, dispose of the jurisdictional objection raised by the respondent: *i.e.*, that the suit was filed more than two years after October 26, 1948, the day on or before which all the chartered ships had been returned to the Commission. If the claim arose on that day, concededly the libel was too late, for October 26, 1950 was the last

day of the two years that followed.* It is common ground that this period of limitation, like all such periods, did not begin to run until the first day when the obligee could have brought suit; and my brothers think that the libellant could have sued October 26, 1948, because all the facts were then in existence on which the computation of the profits depended. I agree that the period of limitation ordinarily does begin to run as soon as all the facts have occurred from which the claim can be liquidated, and that the statute is not tolled because a computation, however complicated, is necessary to ascertain its amount. However, there is a well-recognized exception in the case of mutual accounts, and the right answer here turns upon whether this was such an occasion. In *Spring* v. *Gray*, 6 Pet. 151, the owner sued to recover as freight half the net profits made upon the investment abroad of the proceeds of a cargo shipped for a voyage to Algiers. The defendant pleaded the Statute of Limitations and the libellant answered that the action was upon an "open" account. The Court said that the account was not "open" because (p. 165), although "the sales of the outward and inward cargo and the expenses attendant on the enterprise must be examined to ascertain the amount of freight," the account was nevertheless "founded on the trade of the affreighter alone, to which reference must be made in order to ascertain the amount of the freight." That decision, therefore, did hold that the statute would have been a bar in the case before us, if the suit had been, either by the Commission against the libellant only to recover the proper proportion of its profits, or by the libellant only to recover payments that it had made in supposed compliance with its obligation. It is indeed true that it was to recover payments which the Commission asserted were due under the charter; but it seems to me of critical importance, not only

*Sgambati* v. *United States*, *supra* (172 Fed. (2) 297 (C. A. 2)).

that the Commission decided *ex parte* how much these should be, but that they were to be provisional or contingent payments. They were described as "preliminary," to be paid "at such times and in such manner and amount as may be required by the Owner"; and I think that, when they became items in later accounts between the parties, those accounts were "mutual." This follows, I submit, from the language of "Clause 13" that immediately followed, which provided that the payments were to be "subject to adjustment either at the time of the rendition of preliminary statements, or upon the completion of each final audit by the Owner." As I read the plan, it was that the libellant must pay whatever the Commission provisionally fixed as its share of the profits; that these amounts should be finally determined either by "statements" rendered, or by final audit of the Commission. There can be no doubt that this involved an account made up of cross items, for upon the "adjustments" "such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the charterer as may be required." In short, the profits to which the Commission would be entitled were to remain in abeyance and to be ascertained by seeing how they matched with the libellant's "preliminary" payments. True, when the suit was brought, the facts had all existed for more than two years on which the "adjustments" would be made; but the balance either way was not due until they had been made, and no suit could have been filed until then, at least without showing that the Commission had refused to make the "adjustments." Indeed, to me it would appear most unjust to bar the libellant's claim without such evidence.

Since, however, my brothers think otherwise, we need not decide the merits of the appeal, and I should not discuss them, were it not that they prefer to rest our decision

as well on the merits as on the point of jurisdiction. We all think that the confirmation of the "arrangement" released any claims the libellant may have had. In addition to the language already quoted from the fourth article of the "amended arrangement," it later provided that "upon the acceptance of the plan by United States of America and its confirmation by the Court, the payment by the Debtor of the amounts provided for in this Article 4 shall constitute a full and complete satisfaction, binding upon the Debtor and upon the United States of America, of any and all claims and indebtedness, of whatsoever nature and description between the Debtor and the United States of America existing on July 30, 1948." That not only released the libellant from any claims that the Commission might have against the libellant; but also released the Commission from all claims that the libellant might have against the Commission. Indeed, the libellant challenges its scope only because, immediately following the words just quoted, the article goes on to exclude ship mortgages to the United States, contingent liabilities of the libellant to third persons, present or future, and "any claims for refunds of taxes accrued prior to July 30, 1948."

The libellant argues that this specific release of existing taxes limited the preceding words of general release within the doctrine that general words of release, followed or preceded, by a special and limited release are to be read as limited to the specified claim and are really redundant. We have recently applied this doctrine three times,* and have no wish to disturb its authority; but, as we have always said, it is at most only a canon of interpretation, and in the case at bar it would frustrate the most important purpose of the "arrangement" to limit it to the taxes specified.

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*Vines* v. *General Outdoor Advertising Co.*, 171 Fed. (2) 487, 492; *Kelcey* v. *Tankers Company*, 217 Fed. (2) 541, 547; *Eagle Lion Films* v. *Loew's Inc.*, 219 Fed. (2) 196, 198.

The petition to the Bankruptcy Court alleged that it was the Commission's seizure of the ships that had compelled the libellant to seek the "arrangement," and that, not only did it owe $2,400,000 for hire, but that the Commission owed it $3,400,000, thus necessarily bringing into the proceeding the amount of that claim. The taxes at stake were only a trifling part of the mutual claims, and to confine the composition to them would be to leave out the most important elements of the whole proceeding. It makes no difference whether in July, 1948, the libellant, as it now asserts, may not yet have learned that the Commission had collected from it more than the statute allowed; for it stands beyond cavil that the prime purpose of the "arrangement" was to wipe the slate clean as between the parties.

Finally (let me add for myself), even though I may be right in thinking that the libellant could not have brought any action until long after October 26, 1948, the release still discharged the libellant's claims. The "amended arrangement" was not executed till February 21, 1952, and the fact that any suit to recover whatever claims the libellant had, was conditional upon some "adjustment," did not prevent the unadjusted claims themselves from being released *in praesenti.*

The decree will be affirmed, and the libel dismissed for lack of jurisdiction of the district court.

Decree affirmed.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 160—October Term, 1955.

(Petition filed January 18, 1956

Decided February 24, 1956.)

Docket No. 23723

SWORD LINE, INC.,

*Libelant-Appellant,*

—v.—

UNITED STATES,

*Respondent-Appellee.*

Before:

CLARK, *Chief Judge*, and
HAND and WATERMAN, *Circuit Judges.*

On rehearing.

THEODORE J. BREITWIESER, New York City, *for libelant-appellant.*

WARREN E. BURGER, Asst. Atty. Gen., LEAVENWORTH COLBY, Chief, Admiralty & Shipping Section, and BENJAMIN H. BERMAN, Atty., Admiralty & Shipping Section, Dept. of Justice, Washington, D. C. and PAUL W. WILLIAMS, U. S. Attorney for the Southern Dist. of New York, New York City, *for respondent-appellee.*

CLARK, *Chief Judge*:

Though interesting and important, the further material supplied us for the first time on rehearing does not convince us of any error of law in our decision of December 14, 1955. But since this material is important in itself and does indicate wider reaches to the issues involved than we had known, it seems desirable to cite it here; and because Judge Waterman and I take a slightly different approach from Judge Hand, we ought to avoid any chance of confusion by stating our views more explicitly, though Judge Hand was perfectly fair in his opinion to our divergences.

This was a libel in admiralty in quasi contract for alleged overpayment of charter hire for government merchant vessels. We held that admiralty had jurisdiction, that the claim was time barred, and that additionally it was also barred by a release and compromise with the government effected by a confirmed plan in completed arrangement proceedings of the Sword Line as debtor. At that time libelant had expressly accepted admiralty jurisdiction, leading to the government's somewhat perfunctory notation of jurisdiction, with a formal citation or two; but nevertheless we raised the question at the argument and necessarily considered it with some care, as was our duty. Though our conclusion accorded with that then held by counsel, it obviously suggested to libelant a point it had overlooked; for now the real issue on this rehearing has centered upon libelant's claim vigorously pressed that admiralty lacked jurisdiction and that we had overlooked relevant authorities in holding otherwise.

While the other two issues were also reargued, there is nothing further really to be said on them. We are still all agreed that the release in the Plan of Arrangement ended all claim by libelant; the old Latin maxim *expressio unius* cannot be stressed to defeat the very obvious intent of the parties, as we pointed out before. As to the statute of limitations, the whole point was whether the two-year

period dated from the time of the acts involved, namely, the overpayments, or only from a later audit provided for in Clause 13 of the charter party. While Judge Hand felt that under the circumstances the audit was necessary to start the time running, we thought the authorities required the contrary view. See, e.g., *United States* v. *Atlantic Mut. Ins. Co.*, 298 U. S. 483. There is nothing to the point that payment of an unearmarked portion of the agreed-upon compromise of the government's four million dollar claim in the arrangement proceedings started the time running anew. And so we turn to the interesting and important question of admiralty jurisdiction.

The problem arises because earlier cases in this circuit and elsewhere, cited in our original opinion, had ruled that admiralty had no jurisdiction in quasi contract. The general thesis was that such action arose out of an implied contract and that such implied contract was collateral to any maritime contract, such as the one here for charter hire, and was not within the purview of admiralty. Part of the supporting rationale was that this form of remedy was really an equitable one and that admiralty had no jurisdiction over equity. The theory was brilliantly criticized, see, e.g., Chandler, *Quasi Contractual Relief in Admiralty*, 27 Mich. L. Rev. 23; Morrison, *The Remedial Powers of the Admiralty*, 43 Yale L. J. 1; Robinson on Admiralty 197-200 (1939), and, being of somewhat doubtful character, was not followed so consistently in the cases as to leave a line of clear demarcation of its aegis. In fact, the rationale had little to commend it even on its own ground, for admiralty does resort to and employ equitable principles rather widely. See discussion by Mr. Justice Frankfurter in *Swift & Co. Packers* v. *Compania Colombiana Del Caribe, S.A.*, 339 U. S. 684, 689-696, 19 A. L. R. 2d 630, citing eminent authority. And the ancient remedy in quasi contracts, whatever its origin or slant, was distinctly not a proceeding in equity, but was the very means historically

of getting into the nonchancery courts. *Stone* v. *White*, 301 U. S. 532; *Moses* v. *Macferlan*, 2 Burr. 1005, 97 Eng. Rep. 676 (K. B. 1760); Ames, *The History of Assumpsit*, 2 Harv. L. Rev. 53, Lectures on Legal History 129 (1913).

Moreover, as these and other well-known authorities show, the existence of a contract, implied in law, is a pleasant, if productive, fiction. Actually recovery is based upon principles of justice and good conscience; and it is fictitious to think of some collateral nonmaritime implied contract as even existing, not to speak of controlling. In truth this is a refund of maritime payments originally enforceable in admiralty; there is no good reason for holding that the court which would decree the payment in the first instance should not decree the repayment which the admiralty law now requires. Logic, as well as convenience, dictates such jurisdiction, rather than the discovery of some narrow distinction to send a litigant elsewhere for perhaps a part of an entire claim. For certainly the claim, together with a natural counterclaim or offset, should properly come up in the same litigation without dismemberment and splitting into two lawsuits separately considered.

Against this background the views of the Supreme Court are of course most pertinent. In *Krauss Bros. Lumber Co.* v. *Dimon S.S. Corp.*, 290 U. S. 117, that Court held that recovery of an admiralty overcharge there enforced by lien against a vessel was properly had in the admiralty; and in the course of the discussion it minimized the form of recovery, saying—in addition to the quotation made in our original opinion—in answer to the claim that "the demand is upon a cause of action for money had and received, which lies only at common law and not in admiralty," that "Admiralty is not concerned with the form of the action, but with its substance." 290 U. S. at 124. Hence this case is taken quite generally by commentators as overruling the earlier line of cases barring quasi contractual claims in

admiralty. See, e.g., 23 Calif. L. Rev. 343; 34 Col. L. Rev. 358; 47 Harv. L. Rev. 519; 43 Yale L. J. 506; Robinson, *"Contract" Jurisdiction in Admiralty*, 10 Tulane L. Rev. 359, 396; Robinson on Admiralty, *supra* 200, n. 173. The form of the remedy there enforced, a lien *in rem*, would not seem to suggest any point of distinction; the opportunity to seize a vessel does not of itself transform a land to a maritime cause; and actually *in personam* jurisdiction had there already been upheld in the decision of the Ninth Circuit below, reversing the district court's outright dismissal. See *The Pacific Cedar*, 9 Cir., 61 F. 2d 187, reversing *The Pacific Hemlock*, D. C. W. D. Wash., 53 F. 2d 492, and which is itself reversed only on its dismissal of the libel *in rem*, the sole issue before the Supreme Court.

It is true, as Judge Hand points out, that Justice Stone did find a breach of the maritime contract in the overcharge; and hence Judge Hand has limited his agreement with us that jurisdiction obtains to the finding of such a breach as a prerequisite. But we think this limitation is difficult to work out in any practical sense and may bring back the kind of arbitrary restriction which the *Krauss* case wiped out. This was stated not as a condition of decision in the *Krauss* case, but only as a fact illustrating the narrowness of a distinction that the original charter party may be in admiralty, while refund of an exaction under it may not. So Justice Stone, in referring to the objection that the cause of action lies only at common law, and not in admiralty, went on to say: "The objection applies with equal force to the liens allowed for excess freight, payment of which was procured by fraud or duress, or for freight paid in advance where the voyage was abandoned after the ship was loaded." It was at this point that he said that admiralty is not concerned with the form of the action, but with its substance, as we quoted above.

In all these cases it may be broadly true that the original admiralty charter was at the base of the case. But from

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the standpoint of recovery, the action is not for its breach, but for a debt, i.e., the refund due in good conscience. So in our present case, while the claim is one for overpayment beyond the charter hire, nevertheless the original charter is but a first step, being supplemented by the two further and important steps, first, the modification of the contract by the express terms of an extensive statute and, second, the government's detailed analysis and application of the statutory modification. We think it sounder, and more in accordance with the nature of admiralty, to rest upon the inherent maritime character of the underlying transaction, rather than upon an attempt to force this claim into the mold of a breach of contract. This broader approach also answers various aspects of the libelant's present contention, such as that admiralty jurisdiction cannot rest upon a claim on a statute or must concern a single definite vessel. Such limitations are contrary to the real spirit of admiralty, and actually have not been followed in various situations, of which some examples are collected in the footnote.[1] These all support, often without explicit analysis, admiralty jurisdiction over these claims so basically and intimately intertwined with our vast shipping and maritime interests.

There are two comparatively recent cases in our circuit which follow its older restriction upon admiralty, viz.,

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1 Selected examples may include *United States* v. *La Vengeance*, 3 U. S. 297, 3 Dall. 297, 300, libel for a statutory penalty involving export of arms, "a water transaction"; *The Hope*, *Hobart* v. *Drogan*, 35 U. S. 108, 10 Pet. 108, 119, 120, libel on a state statute for compulsory pilotage; *Ex parte McNiel*, 80 U. S. 236, 13 Wall. 236, 242, a similar case; *The J. E. Rumbell*, 148 U. S. 1, 12, libel on a state statute giving a lien for a maritime claim—the admiralty jurisdiction is exclusive; *Allanwilde Transport Corp.* v. *Vacuum Oil Co.*, 248 U. S. 377, 3 A. L. R. 15 (with two companion cases), libel for refund of prepaid freight; *Globe & Rutgers Fire Ins. Co.* v. *United States*, 2 Cir., 105 F. 2d 160, certiorari denied 308 U. S. 611, the same; *The Harriman*, 76 U. S. 161, 9 Wall. 161, 174, the same, where the exaction is excessive; and *Commercial Trust Co.* v. *United States Shipping Board Emergency Fleet Corp.*, 2 Cir., 48 F. 2d 113, a common count for money had and received to trace a pledge on a maritime loan into third-party hands held cognizable only in admiralty. See also the many libels sustaining as of course libels for damages, contrary to the provisions of contracts or bills

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*Silva* v. *Bankers Commercial Corp.*, 2 Cir., 163 F. 2d 602, by dictum, and *Archawski* v. *Hanioti*, 2 Cir., 223 F. 2d 406, by decision. In both these, however, it appears that the *Krauss* case was not cited or brought to the attention of the court, just as the *Archawski* case was not brought to our attention on the original argument. Now we learn also that in the *Archawski* case certiorari has been granted upon this issue, 350 U. S. 872, which will soon be argued in the Supreme Court; that the same issue was extensively argued in the Court of Claims on December 5 last in two cases where the government takes the same position as here, namely, that admiralty has jurisdiction; and that the issue is also raised in the appeal of *American Eastern Corp.* v. *United States*, D. C. S. D. N. Y., 133 F. Supp. 11, now on our appellate calendar. Seemingly also various other cases involving such claims for repayment of charter hire are pending. The question is obviously important; and clearly we have not until now received that full assistance of counsel which makes for good decisions, while our own researches, perhaps adequate for mere decision, have not covered all the latest ramifications of the problem. Counsel sometimes feel that the court unwisely goes beyond the arguments presented to conduct its own studies and reach its decision thus independent; but these cases are a warning to us, as well as to them, that such excursions are often quite vital to adequate adjudication.

Our conclusion therefore is again that the action was properly brought in admiralty, but that it must fail because of the running of the statute of limitations and also because of the release contained in the executed Plan of Arrangement. Hence we reaffirm our decision affirming the dismissal of the libel.

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of lading which are rendered unenforceable by Acts of Congress, e.g., *Knott* v. *Botany Worsted Mills*, 179 U. S. 69, 77; *The Southwark*, 191 U. S. 1, 16, 17; *United States* v. *Atlantic Mut. Ins. Co.*, 343 U. S. 236, affirming *United States* v. *Farr Sugar Corp.*, 2 Cir., 191 F. 2d 370; *Pan-Am Trade & Credit Corp.* v. *The Campfire*, 2 Cir., 156 F. 2d 603, certiorari denied 329 U. S. 774; and *Balfour, Guthrie & Co.* v. *American-West African Line*, 2 Cir., 136 F. 2d 320, 322, certiorari denied *Balfour, Guthrie & Co.* v. *The Zarembo*, 320 U. S. 804.

HAND, *Circuit Judge* (concurring in part and dissenting in part):

My mind has not changed as to any of the three questions that we discussed before. Regardless of how I might have decided the question as *res nova*, I should have followed *United Transportation Co.* v. *New York & Baltimore Transportation Co.*, 185 Fed. Rep. 386, because, except for special circumstances, I should follow any precedent of this court that had not only remained unchallenged for so long, but had been twice expressly followed. My only reason for not doing so in this instance was that in *Krauss Bros. Lumber Co.* v. *Dimon S.S. Corp.*, 290 U. S. 117, the Supreme Court appears to me to have put its decision squarely upon the theory that it is a breach of the contract of carriage for a carrier to demand and receive more than the stipulated freight, even though the payment is not made a condition upon delivery. Naturally, it is not for me to pass upon the correctness of that interpretation of such a contract.

However, I differ with my brothers in the change they are making in our decree. Strictly, we should not originally have "affirmed" the decree of the district court as we did, because it had been based upon the notion that the "arrangement" was a bar to the suit. Now that we have decided that the libel was filed too late, Judge Murphy never got jurisdiction over the claim at all; and our decision as to the effect of the arrangement is as little within our own jurisdiction as it was within his. Perhaps this was corrected by what was nevertheless an inconsistent statement; that the libel was to be "dismissed for lack of jurisdiction of the district court"; but, be that as it may, I do not agree that our decree should now be amended to determine what was the effect of the arrangement.